Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-780

SCOTT ANDREW SHOVEA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

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TO: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, Scott Andrew Shovea, hereby petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit affirming the judgment of the United States District Court for the District of Colorado.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 580 F.2d 1382. A copy of the Opinion is appended hereto as Appendix "A".

JURISDICTION

This Petition for a Writ of Certiorari draws into question an important point of construction of the Jencks Act, 18 U.S.C. 3500. The decision of the United States Court of Appeals for the Tenth Circuit to be reviewed was entered July 27, 1978. The rehearing and a suggestion for rehearing en banc were denied on September 13, 1978. The Court granted Petitioner a Stay of Mandate on October 6, 1978, until November 5, 1978, in which to file a Petition for Certiorari with this Honorable Court. On October 11, 1978, Associate Justice White of this Honorable Court granted Petitioner's application for an extension of time in which to file a Petition for Writ of Certiorari until November 12, 1978.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. §1254(1).

QUESTION PRESENTED FOR REVIEW

If, in a criminal trial, a Government witness testifies, and later reveals that he destroyed all of his investigatory notes taken concerning the events which were testified to at trial, does the Jencks Act, 18 U.S.C. 3500 mandate that the witness's testimony must then be stricken?

STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Jencks Act, 18 U.S.C. 3500, provide as follows:

> (b) After a witness called by the United States has testified on direct examination, the Court shall, on motion of the Defendant, order the United States to produce any statement, (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Court shall order it to be delivered directly to the Defendant for his examination and use.
>
> (d) If the United States elects not to comply with an order of the Court under Subsection (b) or (c) hereof to deliver to the Defendant any such statement or such portion thereof as the Court may direct, the Court shall strike from the record the testimony of the witness, and the trial shall proceed, unless the Court in its discretion shall determine that the interests of justice require that a mistrial be declared.
>
> (e) The term "statement" as used in Subsections (b) (c) and (d) of this section in relation to any witness called by the United States, means —
>
> (1) A written statement made by said witness and signed or otherwise adopted or approved by him.

STATEMENT OF THE CASE

Petitioner was convicted, along with a Co-Defendant, in the United States District Court for the District of Colorado, for violating 21 U.S.C. §841(a)(1), relating to the manufacture and possession for sale of controlled substances, and conspiracy, and 18 U.S.C. §2, relating to aiding and abetting.

On October 13, 1976, an indictment was returned charging Petitioner along with three Co-Defendants of violating these laws. Trial to a jury commenced on December 6, 1976. On December 8, Petitioner and a Co-Defendant were convicted as stated above. On January 7, 1977, Petitioner was sentenced to a term of imprisonment of one (1) year, with six (6) months suspended. Petitioner perfected a timely appeal to the United States Court of Appeals for the Tenth Circuit.

The facts of the Government's case involved an investigation of a clandestine laboratory. On the evening of September 20, 1976, surveillance commenced at the premises known as 3352 West Gill Place in Denver, Colorado. At that time, Petitioner was observed walking outside of the residence. He was later observed carrying unknown objects from the residence to an automobile parked outside. At this time, agents of the Drug Enforcement Administration arrested this Petitioner and three other persons, secured the residence, and conducted a search which uncovered a laboratory and a quantity of methamphetamine.

Much of the Government's case as it pertained to the surveillance was developed around the testimony of Agent Richard Barter, who testified as to much of the surveillance of the residence. Additionally, it was upon the foundation of Barter's testimony that some fifteen (15) Government exhibits, comprising the bulk of the Government's case, were admitted.

Subsequent to Agent Barter's direct examination, defense counsel inquired if Barter had prepared any reports of the investigation of this case. At this time, it was revealed that Barter had taken notes during the investigation, and that these notes covered the events which he testified to at trial. These notes were turned over to Agent Moren of the Drug Enforcement Administration, who incorporated them into reports which he prepared. The original notes of Barter were destroyed. Defense counsel made formal demand for these notes.

When it was revealed that the notes had been destroyed, Defense counsel made a timely motion to strike the testimony based upon the destruction of these notes and pursuant to 18 U S.C. 3500. Pertinent portions of the record of these proceedings and the transcript are attached and appended hereto as Appendix "B". The Trial Court denied counsel's motion to strike the testimony, on the basis that no prejudice had been shown. The comments of the Trial Court are additionally reproduced in Appendix "B".

The basis of Federal Jurisdiction, which has been preserved throughout the course of these proceedings, is that this case involved an important question of construction of a Federal Statute, 18 U.S.C. 3500.

ARGUMENT

The decisions of this Court have made it quite clear that the purpose of the Jencks Act is to provide defense counsel in a criminal case with any statements of a Government witness which may have possible impeachment value. As was stated in *Campbell v. United States*, 365 U.S. 85, 92 (1961):

> As the Legislative history makes clear, the Jencks Act reaffirms our holding in *Jencks v. United States*, 353 U.S. 657 (1957), that the Defendant on trial in a Federal criminal prosecution is entitled, for impeachment purposes, to relevant and competent statements of a Government witness in possession of the Government touching the events or activities as to which the witness has testified at trial.

Such statements are to be turned over to the defense "if their contents related to the subject matter of the witness's direct testimony and if a demand had been made for specific statements which had been written by the witness . . ."

Palermo v. United States, 360 U.S. 343, 345 (1959).

These cases have reflected "the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice. This realization is reflected in the enactment of the so called Jencks Act, 18 U.S.C. 3500 . . ." *Dennis v. United States*, 384 U.S. 855, 870-871 (1966). When speaking specifically of the need for defense counsel to examine witness statements in a criminal case, this Court noted in *Dennis v. United States*, supra, at 874-875 that:

> Nor is it realistic to assume that the Trial Court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscienciously made would exhaust the possibilities. In our adversary system, it is enough for the judge to judge. The determination of what may be useful to the defense can properly and effectively be made only by an advocate.

This line of thought was similarly recognized in *Palermo v. United States*, supra, 360 U.S. 343, 346, when this Court stated with reference to the Jencks Act that; "Once the statements had been shown to contain related material, only the defense was adequately equipped to decide whether they had value for impeachment."

As the Tenth Circuit recognized in *United States v. Smaldone*, 544 F.2d 456, 461 (CA10 1976):

> The issue of whether hand written, informal or rough interview notes taken by a Government agent during an interview or criminal investigation constitutes produceable Jencks Act "statements" has been much litigated. The issue is unresolved among the Circuits.

In Petitioner's case, the Tenth Circuit resolved the issue as follows:

> We think it would be a judicial invasion into proper law enforcement to require the preservation of such notes (D.E.A. agents' investigatory notes) . . . 580 F.2d at 1390

The split in the Circuits which has now been occasioned is graphically illustrated by the approach taken by the District of Columbia Circuit to the same issue. In *United States v. Harrison*, 524 F.2d 421 (1975), that Court noted as follows:

> . . . The ultimate decision is not, in any event, for the agent to make. The decision on discoverability is emphatically a judicial decision.
>
> . . . The point is simple and cannot be over-emphasized. The Courts, not the investigators nor the prosecutors, make the decision as to whether evidence is discoverable, and that decision cannot be made if the evidence has been destroyed. Obviously, in that event, the evidence cannot be produced. 524 F.2d at 428.

The proposition that the witness's notes are discoverable under the Jencks Act is not new. As early as *Lewis v. United States*, 340 F.2d 678 (1965), the Eighth Circuit held such notes and reports to be discoverable.

The same result was reached by the Ninth Circuit in *United States v. Johnson*, 521 F.2d 1318 (1975), and reaffirmed by the same Court in *United States v. Harris*, 543 F.2d 1247 (1976). The Fifth Circuit reached the same result in *United States v. Bell*, 457 F.2d 1231 (1973), and the District of Columbia Court of Appeals agreed in *Williams v. United States*, 355 A.2d 784 (1976).

Standing opposition to these decisions are the decision of the Tenth Circuit Court of Appeals in the instant case and the decision of the Second Circuit in *United States v. Covello*, 410 F.2d 536 (1969).

It is apparent that a clean split has emerged among the Circuits, thereby establishing traditional grounds for review by this Honorable Court pursuant to Rule 19(b) of this Court.

WHEREFORE, Petitioner requests that this Honorable Court issue a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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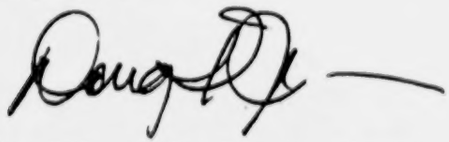

By:_____
DOUGLAS W. JOHNSON

ATTORNEYS FOR PETITIONER

APPENDIX "A"

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 77-1078, 77-1079, 77-1184

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. SCOTT ANDREW SHOVEA, GEBBIE HUGH ROBBA, STEPHEN HOWARD GAIAS, JR., *Defendants-Appellants.*	Appeal from the United States District Court for the District of Colorado (D.C. No. 76-CR-270)

Submitted: May 8, 1978

Jonathan L. Olom, Denver, Colorado, (Stanley H. Marks on the brief) for Appellant Shovea.

Edward L. Kirkwood, Assistant Federal Public Defender, Denver, Colorado, (Daniel J. Sears, Federal Public Defender on the brief) for Appellants Robba and Gaias.

Edward W. Nottingham, Assistant United States Attorney, Denver, Colorado for appellee (Joseph F. Dolan, United States Attorney with him on the brief for Shovea and Robba, Cathlin Donnell, United States Attorney (Interim) with him on the brief for Gaias).

Before BARRETT, McKAY, Circuit Judges, and BRATTON, District Judge.*

BARRETT, Circuit Judge.

* Of the District of New Mexico, sitting by designation.

Scott Shovea (Shovea), Gebbie Robba (Robba) and Stephen Gaias (Gaias) appeal their jury convictions of conspiracy to manufacture and possess with intent to distribute methamphetamine, a schedule II controlled substance, in violation of 18 U.S.C.A. §2 and 21 U.S.C.A. §841(a) (1).

Appellants were originally indicted with Geoffrey Hungerford (Hungerford). At the commencement of the trial, the Government dismissed its charges against Hungerford. Thereafter, a mistrial was declared as to Gaias. The trial proceeded as to Shovea and Robba. They were convicted. Subsequent thereto, Gaias was tried individually and convicted. A detailed recitation of the pertinent facts should facilitate our review.

Gaias originally ordered a chemical, phenyl-2-propanone (p-2-p), a primary precursor of methamphetamine, from a New York chemical company under the name of "Jay Edwards." The order was submitted on behalf of "Royce International, 315 Broadway, Port Jefferson, New York." Thereafter federal agents set up a controlled delivery for the chemical.

On September 17, 1976, Gaias was observed by the agents picking up the chemical, after which he was followed

to 315 Broadway, a house in a residential area. Shortly thereafter, Gaias was observed exiting the house carrying a suitcase very carefully. He held the suitcase flat, rather than by the handle. Two agents then followed Gaias to an airport. While en route, Gaias drove in excess of the posted speed limits in an elusive manner. Once at the airport, Gaias boarded a plane which flew to Denver. The agents flew to Denver on the same plane. They kept Gaias under surveillance at all times. Gaias arrived in Denver during the early morning hours of September 18, 1976. He was met there by Robba. Gaias and Robba drove from the airport to a residence located at 3352 West Gill Place. Agents followed them to the residence. After Robba and Gaias entered the house, the agents placed an electronic tracking device on Robba's car. Sporadic surveillance of the residence continued September 18 through September 20, 1976.

Gaias' suitcase did not arrive on his incoming flight but it did arrive in Denver later that morning. Prior to its arrival, Gaias filled out a lost luggage claim wherein he listed Robba's name and requested that the suitcase be delivered to 3352 West Gill Place upon its arrival. The suitcase was X-rayed following its arrival at the Denver airport. The X-rays revealed that four bottles were in the suitcase. The agents did not open the suitcase. Pursuant to Gaias' request, the suitcase was delivered to 3352 West Gill Place.

Shortly after the suitcase was delivered, Gaias and Robba were observed by the agents leaving the residence and proceeding to Royce International where they, together with Shovea, loaded and unloaded boxes from their vehicles. Robba and Shovea were both employed at Royce International at that time. Investigation had established that someone allegedly associated with Royce International had, within the prior four months, ordered various chemicals and glassware from a scientific company, all of which could be utilized in the manufacture of methamphetamine.

On the evening of September 20, 1976 agents detected a strong odor of ether emanating from the 3352 West Gill Place residence. Shovea was observed leaving the residence, walking down the street, looking in all directions, and then returning to the residence. The agents, based on their prior experience, associated the strong odor of ether and Shovea's suspicious movements with the clandestine manufacturing of methamphetamine. Accordingly, when all of the defendants were observed leaving the residence carrying boxes which they loaded into Hungerford's car, the three agents arrested them.

After the arrests were effected, the cars and the residence were secured while a search warrant was obtained. The affidavit in support of the requested warrant stated in part: "Fellow agent Larry Lamberson stated that he checked with the airport authorities and found that the suitcase carried by Gaias was X-rayed and 4 bottles were seen inside." [R., Vol. IV, at 8.] The warrant was issued. A subsequent search of the cars and residence disclosed concentrated liquid methamphetamine and numerous articles used in its manufacture.

Prior to trial, a hearing was held on defendants' motions to suppress evidence allegedly seized as a result of the X-ray search of the suitcase as well as the evidence seized by searching the cars and the residence. The trial court ruled that the X-ray search of the suitcase constituted an unlawful search violative of Gaias' Fourth Amendment rights. A mistrial was granted as to Gaias. The trial court ruled, however, that the evidence of the airport X-ray search was admissable against Shovea and Robba; that evidence seized by search of the cars and the residence was admissable against all of the defendants; and that the search of the cars and residence was not tainted by reference in the affidavit alluding to the X-ray search of the suitcase which disclosed the four bottles.

After the court had ruled on the various motions to suppress, Shovea and Robba proceeded to trial. In the course of their trial, the Government developed the conspiracy in detail. A forensic chemist testified for the Government. He identified the chemical seized as methamphetamine and stated that the volume seized would produce approximately 100,000 doses. At the close of the Government's case, Shovea and Robba elected not to present any evidence. Verdicts of guilty were subsequently returned against them.

Thereafter, Gaias was tried. Prior to trial, the court ruled that the *Wong Sun* doctrine did not preclude admission of the evidence obtained via issuance of the search warrant inasmuch as the information relative to the X-ray of the suitcase contributed little to the search of the residence, and that the Government "could easily have established probable cause for the search of the house had there been no search at the airport." [R., Vol. I, p. 10.] At the conclusion of the Government's case, Gaias moved for acquittal. The motion was denied. Thereafter, the defense rested without introducing any evidence. Gaias was convicted.

I.

Robba contends that the trial court erred (1) by allowing the Government to introduce evidence obtained by exploitation of the X-ray search of the suitcase, and (2) by allowing the admission of evidence obtained by exploitation of the illegal surveillance precipitated by the use of an electronic tracking device placed on his vehicle.

(a)

Robba claims that the trial court erred in allowing the Government to introduce testimony and exhibits obtained by exploitation of the illegal X-ray search of the suitcase and

by ruling that he did not have standing to challenge the X-ray search. Robba argues, in part based upon an affidavit which was not admitted in evidence, that he provided Gaias funds to purchase p-2-p in New York, that he was the owner of the p-2-p purchased, the the p-2-p was purchased in the name of Royce International where he was employed and the lost luggage claim filled out by Gaias set forth his (Robba's) name and residence for purposes of identity and delivery of the suitcase. Robba contends that under these circumstances he had standing to challenge the X-ray search. Robba declares that the X-ray search was illegal and that the illegality thereof was compounded when the Government exploited the X-ray results in order to obtain the search warrant. Under the totality of these circumstances, Robba concludes that the "fruit of the poisonous tree" doctrine as enunciated in *Wong Sun v. United States*, 371 U.S. 471 (1963) precluded admission of all "the incriminating evidence which the government developed after they searched Robba's residence and the two vehicles adjacent thereto." We hold that the trial court did not err in finding that Robba lacked standing to challenge the X-ray search or in admitting in evidence the testimony and certain exhibits derived from the search.

Robba failed to establish standing to challenge the search. In *United States v. Galvez*, 465 F.2d 681 (10th Cir. 1972), we said:

> Our conclusion that the two defendants in the instant case have no standing to contest the legality of the seizure of the package containing hashish from Karen's automobile in Walsenburg is supported by our understanding of such cases as *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960); *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); and *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1969), as well as by numerous cases from this circuit.

In *Jones*, the Supreme Court declared as follows:

> "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.***
>
> "Ordinarily, then, it is entirely proper to require of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he allege, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy.***"

In *Wong Sun*, it was held that heroin unlawfully taken from another was nonetheless admissible in evidence against Wong Sun because the "seizure of this heroin invaded no right of privacy of person or premises which would entitle Wong Sun to object to its use at his trial." So, here, the seizure of the hashish from Karen invaded no right of privacy of person or premises which would entitle Donald or Veronica Galvez to object to its use at their trial.

And in *Alderman*, the Supreme Court "adhered" to such cases as *Jones* and *Wong Sun*, and to the general rule "that Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted."

Cases from this circuit which hold that to be a "person aggrieved" within Fed.R.Crim.P. 41, the person moving to suppress must himself have been the victim of any unlawful invasion of his own privacy, are: *United*

States v. Humphrey, 409 F.2d 1055 (10th Cir. 1969); *Cochran v. United States*, 389 F.2d 326 (10th Cir. 1968), cert. denied, 391 U.S. 913, 88 S.Ct. 1808, 20 L.Ed.2d 653 (1968), reh. denied, 393 U.S. 899, 89 S.Ct. 70, 21 L.Ed.2d 187 (1968); *Sumrall v. United States*, 382 F.2d 651 (10th Cir. 1967), cert. denied, 389 U.S. 1055, 88 S.Ct. 806, 19 L.Ed.2d 853 (1968), and *Elbel v. United States*, 364 F.2d 127 (10th Cir. 1966), cert. denied, 385 U.S. 1014, 87 S.Ct. 726, 17 L.Ed.2d 550 (1967), reh. denied, 386 U.S. 939, 87 S.Ct. 959, 17 L.Ed.2d 812 (1967). . . .

465 F.2d, at 684-685.

Inasmuch as the X-ray search was directed at Gaias not Robba, and since Robba "claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else," he has not attained standing to challenge the X-ray search.

Even assuming, *arguendo*, that Robba did have standing, the reference to the X-ray search in the affidavit executed in support of the search warrant did not vitiate its efficacy nor did it "taint" the validity of the subsequent search and seizure. The affidavit clearly contained adequate factual basis establishing probable cause without reference to or reliance on the X-ray search. The affidavit stated, *inter alia*: Gaias was observed purchasing p-2-p in New York in the name of Royce International and thereafter flying to Denver; odors emanating from the 3352 West Gill Place residence on September 20, 1976, were identical to those which the experienced agents had smelled on numerous prior occasions while investigating the clandestine manufacture of amphetamines; and the agents were aware that Royce International, where Robba and Shovea were employed, had recently received chemicals and equipment normally used in the manufacture of amphetamines.

The adequacy of the affidavit, aside from any reference to the X-ray search, was recognized by the trial court:

> If the evidence had been what I understood it to be, that there would not have been any search of the house had it not been for the X-ray at the airport, then I would say you are within the *Wong Sun* rule, but that record is pretty strong that the airport search contributed very, very little to the search at the house. And as I analyze the evidence, beyond any shadow of a doubt, the agency and the government could easily have established probable cause for the search of the house had there been no search at the airport. And indeed, as I look at the search warrant affidavit, the probable cause, I think, is clearly there absent the airport search.
>
> Now, if you want to put on more testimony, you may. But on the basis of the record made, I do not think that the *Wong Sun* rule includes any evidence of taint at the house in the course of the search there made. I just do not think it goes that far.
>
> And I realize that at this point, I am contradicting, in a sense, what I have said before, and what I have said in a written order to the effect that it was, the airport search was a major part of the reason for the search of the house. I am just plain wrong; it was not. The appellate courts get to read it and think about it; we have to just listen to it.
>
> [R., Vol. I, at 10-11.]

Furthermore, even assuming that Gaias was actually purchasing the p-2-p for Royce International, Robba would nevertheless have no standing as an individual to challenge the search. *See: United States v. Curtis*, 537 F.2d 1091 (10th

Cir. 1976), *cert. denied*, 429 U.S. 962 (1976), and cases cited therein.

In the final analysis, the reference to the X-ray search in the affidavit did not give rise to error, particularly when, as here: the suitcase was simply X-rayed, and not opened; the X-ray established that the suitcase contained four bottles; but it did not in anywise establish the *content* of the bottles; no direct evidence of the X-ray search was offered by the Government; and Gaias' purchase of the p-2-p, his elusive trip to the airport and his subsequent flight to Denver, combined with the strong odors emanating from the residence, generated sufficient independent probable cause for issuance of the warrant.

(b)

Robba contends that the trial court erred in allowing the Government to introduce testimony and exhibits obtained by reason of the exploitation of an illegal surveillance of his vehicle by the use of an electronic tracking device. As noted, *supra*, when Gaias arrived at the airport in Denver, he was met by Robba and the pair then proceeded to Robba's residence in his car. After the parties entered the residence, agents placed an electronic tracking device on Robba's car.

Later the same day, Robba and Gaias were observed leaving the residence in Robba's car. Several agents followed the car. While en route, the agents following the car lost visual contact. Thereafter, by utilizing the tracking device, the agents were able to trace Robba and Gaias to Royce International where they were observed, together with Shovea, loading and unloading boxes from their respective vehicles.

The utilization of an electronic tracking device, without prior court approval, may be justified by probable cause and

exigent circumstances. The following observations in *United States v. Frazier*, 538 F.2d 1322 (8th Cir. 1976), *cert. denied*, 429 U.S. 1046 (1977) are applicable here:

> Whether the installation of an electronic tracking device on a motor vehicle is a search or seizure within the protection of the Fourth Amendment is a difficult question. At a minimum, the attachment of such a device, without consent or judicial authorization, is an actual trespass. Although only a limited intrusion, it is one which raises a concern that the government could plant a tracking device on a person's car and follow its movements whenever and wherever it is being driven. *See: United States v. Martyniuk, supra*, 395 F.Supp. at 44-45. In contrast, it is at least questionable whether a person has a reasonable expectation of privacy with regard to his movements on public roads. *See: Cardwell v. Lewis*, 417 U.S. 583, 588-92, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974); *United States v. Carpenter, supra*, 403 F.Supp. at 364-65. *Cf. Katz v. United States*, 389 U.S. 347, 350-59, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). In any event, the issue need not be resolved in this appeal since we are convinced the intrusion committed in the instant case, assuming arguendo that it is a search or seizure within the ambit of the Fourth Amendment, was justified by probable cause and exigent circumstances.

The search of a motor vehicle, especially its exterior, is less intrusive and implicates a lesser expectation of privacy than otherwise applies under the general warrant requirement. *See: Cardwell v. Lewis*, 417 U.S. 583, 589-91, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974); *Almeida-Sanchez v. United States*, 413 U.S. 266, 279, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973) (Powell, J., concurring). If there is probable cause, an automobile, because of its mobility, may be searched without a warrant in circumstances that would not justify a warrant-

less search of a house or office. *Chambers v. Maroney*, 399 U.S. 42, 48-51, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll v. United States*, 267 U.S. 132, 158-59, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *United States v. Brown*, 424 F.2d 535, No. 75-1863 (8th Cir. 1976). Probable cause exists when the facts and circumstances within a police officer's knowledge would "'warrant a man of reasonable caution in the belief that' an offense has been or is being committed."

538 F.2d at p. 1324.

See also: United States v. Moore, 562 F.2d 106 (1st Cir. 1977) and *United States v. Hufford, 539 F.2d 32 (9th Cir. 1976), cert. denied*, 429 U.S. 1002 (1976).

Applying these standards we hold that the agents had sufficient probable cause to attach the electronic tracking device to Robba's car without first acquiring a court order, and that such an installation herein was not violative of Robba's Fourth Amendment rights.

Prior to attaching the device to Robba's car the agents knew that Gaias had recently purchased p-2-p, a primary precursor of methamphetamine, and that he had made the purchase in the name of Royce International; after purchasing the p-2-p Gaias was observed leaving his residence carrying a suitcase in a flat, careful manner; Gaias was observed driving to a New York airport in an elusive manner and thereafter flying to Denver where he was met by Robba during the early morning hours after which the pair proceeded to Robba's residence.

Furthermore, as in *Frazier, supra*, "[t]hese same facts also suggest the existence of exigent circumstances justifying the limited intrusion (installation of a beeper) conducted in the instant case." Gaias was followed directly from New

York to Denver and thence to Robba's residence, arriving in the early morning hours. Surveillance was initiated shortly thereafter at a time when no magistrates were available, and at a time when the agents had no idea if Robba and Gaias would remain in the residence for a few minutes, a few hours, or for a few days.

Although the agents were therefore fully justified in attaching the electronic tracking device to Robba's car, without first securing a court order, we note the device did little more than assist the agents in following Robba and Gaias to Royce International. Once at Royce International, Robba and Gaias were observed, along with Shovea, in loading and unloading boxes into their respective vehicles. This evidence was not dispositive nor crucial and its exclusion would not have affected the outcome reached.

II.

Shovea contends: (1) the evidence was insufficient to convict; (2) the trial court erred in refusing to strike Agent Barker's testimony; (3) his motion for mistrial should have been granted after the United States Attorney made improper rebuttal argument; (4) the trial court erred in not suppressing the evidence obtained via execution of the search warrant; (5) the jury was improperly instructed relative to possession; and (6) Government witnesses were allowed to testify as experts in an area in which they were not properly qualified.

(a)

Shovea contends that the evidence was insufficient to support the verdicts of guilty returned against him for conspiracy, manufacture and possession with intent to distribute methamphetamine, and aiding and abetting. On appeal

from a jury conviction, we must view the evidence, both direct and circumstantial, and all reasonable inferences to be drawn therefrom in the light most favorable to the Government in determining its sufficiency. *United States v. Walton*, 552 F.2d 1354 (10th Cir. 1977), *cert. denied*, 431 U.S. 959 (1977); *United States v. Brown*, 540 F.2d 1048 (10th Cir. 1976), *cert. denied*, 429 U.S. 1100 (1977). Applying this standard to the facts in this record, we hold that the evidence is sufficient to sustain the Shovea conviction.

Aside from the fact that Shovea was observed at his place of employment, Royce International, on September 18, 1976, together with Robba and Gaias moving objects between a warehouse and his vehicle which "brief vignette . . . [Shovea alleges] . . . connects up in no way with the subsequent facts of the case," Shovea was observed exiting and reentering the residence in question on the evening of the arrest looking about carefully, at a time when methamphetamine was being manufactured in the residence and from which a strong odor of ether emanated. He was thereafter observed shortly prior to his arrest, carrying boxes and a barrel from the house which contained methamphetamine. These facts established sufficient evidence upon which the jury could convict Shovea. *See: United States v. Stricklin*, 534 F.2d 1386 (10th Cir. 1976), *cert. denied*, 429 U.S. 831 (1976).

(b)

Shovea contends the trial court erred in failing to grant his motion to strike the testimony of DEA Agent Barker following revelation that all of the agent's investigatory notes relative to the events herein had been destroyed. Agent Barker's notes taken during the investigation, were turned over to Agent Moren. Thereafter, Agent Moren incorporated Barker's notes into a report, after which Barker's notes were destroyed pusuant to established policy.

An *in camera* hearing was held on Shovea's motions to dismiss based on the destruction of the notes or in the alternative to strike:

> THE COURT: But I'm not aware of any substantial body of law which supports a motion to strike or any other type of motion based upon the destruction of notes in the absence of a showing that the destruction was with malice or evil motive or intent.
>
> I'm not aware of any body of law which says that the motion is good, whereas here the destruction I gather was in accordance with recently established investigative practices in the — within the rules and regulations of this particular agency at that time.
>
> I find absolutely nothing in the evidence to suggest that there was any evil motive in destruction. I find absolutely nothing in the evidence to suggest possible prejudice to the defendant. If you can show me either evil motive or real prejudice to the defendant, that's something else again, but I'm not going to grant your motion in the absence of that.
>
> MR. MARKS: Your Honor, I understand what the criteria are that the Court is setting out. I would submit that I think it would be extremely difficult for any attorney to show prejudice when the document is no longer in existence. And, of course, I don't have any way of adivising the Court of what was contained therein.
>
> THE COURT: That's entirely true, but the cross-examination in the area was pretty limited. I think if you'd really thought there was any evil motive or prejudice, knowing your abilities as a cross-examiner, you would have gone a lot farther and a lot harder. I would have.

MR. MARKS: Frankly, I would, too. I don't know of any evil motives and I doubt there were evil motives.

THE COURT: So do I.

[R., Suppl. Vol. II, pp. 322-323.]

In *United States v. Covello,* 410 F.2d 536 (2d Cir. 1969), *cert. denied,* 396 U.S. 879 (1969), the Court opined:

> Appellant next claims that the good faith destruction of handwritten interview notes deprived him of his right at a trial under the Jencks Act. At the close of the direct examination of each of the Government's main witnesses defendant requested and received FBI reports regarding FBI interviews with each of the witnesses. Defendant claims, however, that under 18 U.S.C. §3500 he was also entitled to the original handwritten interview notes of the FBI agents from which the reports were made. At a voir dire examination the agents testified that, pursuant to the practice they customarily follow, they destroyed their notes in good faith after incorporating them into typewritten reports. Under the circumstances, we find no violation of §3500. The case law amply supports our ruling. Absent an indication that the notes were destroyed for an impoper purpose or that the handwritten data was not preserved in the formal reports the reports satisfy the requirements of §3500 . . . (Citations omitted.)

410 F.2d, at p. 545.

See also: United States v. Fred Lane, ____ F.2d ____ (10th Cir. 1978), filed April 6, 1978, where this court said in pertinent part:

> We think it would be a judicial invasion into proper law enforcement to *require* the preservation of such notes (DEA agents' investigatory notes) and are convinced that to reverse this case as appellant urges at this late date would thwart justice. *See generally, United States v. Smaldone,* 10 Cir., 484 F.2d 311-18, *cert. denied,* 415 U.S. 915.

Slip Opinion, p. 5.

Applying this standard, we hold that the trial court did not err in refusing to strike Agent Barker's testimony.

(c)

Shovea contends the court erred in refusing to grant his motion for a mistrial made subsequent to rebuttal argument presented by the Government. In closing his argument the Assistant United States Attorney stated:

> And they'd have you believe, well, the reason Mr. Shovea was out at Royce International is because he worked there. Well, I'll concede that he did work there, ladies and gentlemen, but an interesting thing about that, Mr. Shovea — it came out in testimony that he worked there at Royce International. Well, I'm just wondering, perhaps, if he was the one that gave Mr. Gaias the idea to use the fictitious name in New York of Royce International to order the phenyl-2-proponon that was used to make the metamphetamine. It's a possibility. And it's something I would like you to consider in your deliberations.
>
> Thank you for your time and patience.

[R., Suppl. Vol. II, pp. 359-360.]

Shovea argues that "no evidence whatsoever was ever introduced which could lead to the supposition or inference that Mr. Shovea gave Mr. Gaias the idea to use the name in New York of Royce International with which to order the phenyl-2-proponon." Shovea did not object to the statement when made but he did move for a mistrial thereafter:

> MR. MARKS: Based upon Mr. Fanning's last comments in his closing statement, his comments as far as his surmise as to what may have happened, were not supported by the evidence.
>
> THE COURT: Had you objected at that time, I would have corrected it, but I'm not going to give you a mistrial.
>
> MR. MARKS: Well, I didn't want to object at that time. I thought that would bring more attention.
>
> THE COURT: You could have corrected it. Do you want time tomorrow. No, I'll deny your motion for mistrial.
>
> [R., Suppl. Vol. IV, p. 384.]

In light of the fact that Shovea did not object to the prosecutor's statement when made, we must determine if the statement gave rise to clear error. In *United States v. Stevens*, 452 F.2d 633 (10th Cir. 1972), we observed:

> In determining whether the "clear error" rule should be invoked, the entire record must be reviewed and considered. *Adams v. United States*, 375 F.2d 635 (10th Cir. 1967), *cert. denied*, 389 U.S. 880, 88 S.Ct. 117, 19 L.Ed.2d 173 (1967); *Jennings v. United States*, 364 F.2d 513 (10th Cir. 1966), *cert. denied*, 385 U.S. 1030, 87 S.Ct. 760, 17 L.Ed.2d 677 (1967). And in weighing whether there was a clear error the most significant factor to be considered is the strength of the case against the defendant. *United States v. Williams*, 445 F.2d 421 (10th Cir. 1971). The evidence against Stevens is substantial; the testimony concerning other stolen vehicles could not have had a significant effect in influencing the jury verdict. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946).
>
> 452 F.2d, at p. 635.

We hold that the prosecutor's comment did not give rise to clear error. Shovea's participation in the conspiracy was substantial. Error, if present, was harmless. In *United States v. Guerrero*, 517 F.2d 528 (10th Cir. 1975), we stated:

> We recently noted in *Young v. Anderson*, 513 F.2d 969 (10th Cir. 1975), citing to *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed. 2d 431 (1974):
>
> > . . . not every trial error or infirmity which might call for application of supervisory powers correspondingly constitutes a "failure to observe that fundamental fairness essential to the very concept of justice." *Lisenba v. California*, 314 U.S. 219, 236 [62 S.Ct. 280, 290, 86 L.Ed. 166] (1941).
>
> 416 U.S. 637, at 642, 94 S.Ct. 1868, at 1871, 40 L.Ed.2d 431.
>
> 517 F.2d, at p. 531.

See also: United States v. Hall, 536 F.2d 313 (10th Cir. 1976), *cert. denied*, 429 U.S. 919 (1976); *Sanchez v. Heggie*, 531 F.2d 964 (10th Cir. 1976); *cert. denied*, 429 U.S. 864 (1976).

Shovea's trial attorney was aware that the comment was made. He opted, as a matter of trial tactic, not to move

the court for corrective action at that time. Under these circumstances and in view of the relative harmless nature of the comment, the trial court properly refused to grant Shovea's motion for mistrial.

(d), (e) and (f)

Shovea's remaining allegations of error do not merit further detailed discussion. The evidence obtained by the serch following execution of the search warrant was proper, as discussed under Robba, *supra*; the trial court's instructions relating to possession were proper; and the Government's experts were properly qualified.

III.

Gaias' sole allegation of error is that the trial court erred in allowing in evidence that which the Government obtained by search and seizure at 3352 West Gill Place following the execution of the search warrant, since "that search warrant was substantially based upon a previous unconstitutional search of . . . [his] . . . suitcase." This contention is without merit. *See* Robba (a), *supra*.

WE AFFIRM.

AUGUST TERM — September 13, 1978

Before The Honorable Oliver Seth, The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, The Honorable James E. Barrett, The Honorable William E. Doyle, The Honorable Monroe G. McKay, The Honorable James K. Logan, Circuit Judges, and The Honorable Howard C. Bratton, District Judge.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

SCOTT ANDREW SHOVEA,
Defendant-Appellant.

No. 77-1078

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Judges Barrett, McKay and Bratton, to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court by polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

HOWARD K. PHILLIPS
Clerk

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Criminal Action No. 76-CR-270

UNITED STATES OF AMERICA,
Plaintiff,
vs.
SCOTT SHOVEA, et. al.,
Defendants.

PARTIAL TRANSCRIPT AND RULING OF COURT

TESTIMONY OF THE WITNESS BARTER

Q. (By Mr. Marks) Officer, did you prepare any reports in the preparation of this case — of the investigation of the case?

A. Yes, sir, I did.

Q. Do you have those with you today?

A. No, sir, I do not.

MR. MARKS: I would ask those from the United States Attorney, Your Honor. I don't believe I've received any.

MR. FANNING: Your Honor, may we approach the bench for a minute?

THE COURT: Yes.

(At the bench)

MR. FANNING: The only report that I have in my possession, which was turned over to the defense as a report by Agent Barter, is not pertaining to this testimony. It's a report that you had in your possession concerning the interview of Hungerford. Now if he can ask him what report he's talking about.

THE COURT: Alright, clarify it and if it's a report you're entitled to, you can have it.

MR. MARKS: Very well.

(In Open Court)

Q. (By Mr. Marks) Officer, I would hand you a report previously tendered to me. Is that the report you are referring to?

A. Yes, sir, it is.

Q. Are there any other reports you prepared or contributed to, to your knowledge?

A. I believe — this is the only report I have personally prepared on my own. I have done the evidence reports and the original report Agent Moren did, I conbributed to that.

Q. That one has Agent Moren's signature on it?

A. Yes, sir, it does.

Q. I see. Did you take any notes during the investigation of this case, handwritten notes?

A. I'm sure that I did.

Q. Are they still in existence?

A. I don't have them, sir, no.

Q. Are they still in existence?

A. To my knowledge, they are not, sir.

Q. Who did you turn them over to?

A. They were — I believe they were given to Agent Moren to begin with.

MR. MARKS: Alright, I would ask for those.

THE COURT: Alright, do you have those?

(Discussion off the record between Plaintiff's counsel and advisory witness.)

MR. FANNING: Your Honor, they are not in existence.

THE COURT: Well, I think you'd better put on some testimony here on who destroyed them, why and under what circumstances.

MR. MARKS: I would reserve the right, Your Honor, to go into that matter at a later time.

THE COURT: Sure, you can go into it now if this gentleman knows anything about it.

Q. (By Mr. Marks) Do you have any knowledge as to what Agent Moren did with those notes?

A. No, sir, I don't.

Q. Do you have any knowledge what anyone did with those notes?

A. No, sir, I don't.

Q. Did those notes reflect your observations in the investigation of this case?

A. Yes, sir, they did.

Q. And you just testified on direct examination concerning some of the materials contained within those notes?

A. I'm sure that I have, yes, sir.

MR. MARKS: Then without waiving a later objection to ask this testimony be stricken, I would proceed with the cross-examination, if I may.

THE COURT: Go ahead.

RULING OF THE COURT

(After argument of counsel)

THE COURT: Where — except for the Ninth Circuit case, what law do you have to that effect? What it says is after a witness, called by the United States, has testified on direct examination, the Court shall on motion of the Defendant, order the United States to produce any statement as hereinafter defined of the witness in the possession of the United States.

And then the term statement as used in this Statute means a written statement made by said witness and signed or otherwise adopted or approved by him.

Now, I'm aware of the fact that there is a growing — I don't know if it's a growing — I am aware of the fact that there are a few cases which frown on the practice of investigative agencies having the agents destroy their notes. I am also aware of the fact that I think very probably that that practice grew in favor due to the fact that it was an established custom of the Federal Bureau of Investigation for many, many years. In fact their investigative manual directed that.

And I think many other agencies adopted the same procedure.

I am also aware of the fact that after some of the more recent cases, most of the investigative agencies are changing their procedure, and I think it highly likely that in the future, you're going to see less and less of it.

But I'm not aware of any substantial body of law which supports a motion to strike or any other type of motion based upon the destruction of notes in the absence of a showing that the destruction was with malice or evil motive or intent.

I'm not aware of any body of law which says that the motion is good, whereas here the destruction I gather was in accordance with recently established investigative practices in the — within the rules and regulations of this particular agency at that time.

I find absolutely nothing in the evidence to suggest that there was any evil motive in the destruction. I find absolutely nothing in the evidence to suggest any possible prejudice to the Defendant. If you can show me either evil motive or real prejudice to the Defendant, that's something else again, but I'm not going to grant your motion in the absence of that.

CERTIFICATE OF SERVICE

I hereby certify that I placed three (3) copies of the foregoing Petition for a Writ of Certiorari in the case styled SCOTT ANDREW SHOVEA, Petitioner v. UNITED STATES of AMERICA, Respondent in the United States Mail, with air mail postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530 this 7th day of November, 1978.

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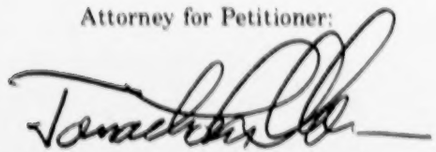

JONATHAN L. OLOM